IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1371

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,

Petitioners,

against

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Petitioners,

against

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County.

Respondents.

BRIEF FOR STATE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR SUMMARY REVERSAL AND EXPEDITED APPEAL

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Respondents.

BRIEF FOR STATE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR SUMMARY REVERSAL AND EXPEDITED APPEAL

Opinions Below

In the courts below this case is, as yet, unreported. The Court of Appeals opinion is presently found in the slip

sheet opinions of that Court at p. 2605 (No. 632, 633—September Term, 1971), and is also reproduced in the Petition for a Writ of Certiorari at pp. 2a-10a. The reversed opinion of Chief Judge MISHLER of the Eastern District of New York is 71 C. 1573, February 10, 1972 (Petition—pp. 11a-37a).

We have reproduced the reversed judgment of the District Court in our Supplemental Appendix, p. 1a.

Jurisdiction

The petitioners have relied on 28 U.S.C. § 1254(1) to invoke the jurisdiction of this court.

Question Involved

Does New York Election Law § 186 unconstitutionally deprive petitioners of the right to vote in the 1972 New York primary when they were eligible to timely do so before the last general election, but failed to so enroll?

The Court of Appeals, Second Circuit, answered "no".

Statement of the Case

Petitioners are all registered voters who were eligible to enroll in a political party under New York law before the last general election in November 1971. The Petition only discusses Stephen Eisner's factual situation although there are three *Rosario* petitioners. The *Eisner* complaint alleges only that Mr. Eisner attained 21 on December 30, 1970 and resides in Valley Stream, N. Y. On December 13, 1971, he registered to vote in Nassau County and allegedly completed an enrollment blank for the Democratic Party which was then deposited, under Election Law § 186, in a sealed box until after the next general election. Hence he

is not an enrolled Democrat for the 1972 primary. Any other facts alleged in the Petition, *Statement of the Case*, p. 6, are not in the complaint and therefore not part of the record.

Rosario—These petitioners are not discussed in the Petition. However, the complaint shows, that all three are new voters who registered in New York City on December 3, 1971, and allegedly enrolled in the Democratic Party. Mr. Rosario is 18, the other two over 21. All are ineligible to vote in the June 1972 primary, Election Law § 186, because they could have enrolled prior to the last general election.

The petitioners in both proceedings have apparently long resided in New York State, *e.g.*, petitioner Eisner for the last 15 years. They challenged the constitutionality of § 186 insofar as it prevented newly enrolled voters from voting in the June 1972 primary.* Complaints—*Rosario*, ¶ 7; *Eisner*, WHEREFORE ¶ 2.

Petitioner Eisner, while at most representative of the newly enrolled voter, purports to represent all persons "in the box". There are also two other major "classes" not involved in the instant cases: (1) persons seeking to change party affiliations and (2) newly arrived New York residents and persons who move from one county to another outside the City of New York after the last general election.

Petitioners also are not representative of newly enfranchised voters who have reached 18 since the last general election. They can specially enroll and vote in the New York primary—Election Law § 187, subd. 2. Petitioner

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*The same attorneys had previously brought a similar case, *Bachrow* v. *Rockefeller*, 71 C. 930, Eastern District of New York. It presented the additional issue of an enrolled voter who moved from one county to another and was "in the box" as well as the issue of the newly enrolled voter. It was dismissed as moot, three-judge court, September 8, 1971, since there were no primary contests for those plaintiffs to vote in. No appeal was taken.

Eisner is not even representative of the 18-21 year olds enfranchised by the Twenty-sixth Amendment since he was 21 before its enactment.

In the District Court, the petitioners dropped their demand for any injunctive relief and applied solely for a declaratory judgment. The *Eisner* complaint did not request class action relief, Rule 23. The *Rosario* complaint did but the request was never pressed and no class action order was ever granted although Judge MISHLER in his opinion did call this a "class action", but even he limited the "class" solely to newly enrolled voters, Pet. p. 12a. The District Court consolidated the two actions, Rule 42A, and granted declaratory judgment declaring § 186 "totally" unconstitutional (see *infra*, Judgment, p. 1a).

On appeal by the State defendants and the Nassau County Board of Elections, the Court of Appeals for the Second Circuit unanimously reversed the District Court. Recognizing that New York had a compelling state interest in preventing party "raiding" and protecting party integrity, the opinion (LUMBARD, C. J.) found § 186 a reasonable regulation of the party primary process which could not be effected by less drastic means. Indeed it was praised as a highly effective part of New York's effort to minimize the possibility of debilitating political practices. The opinion used the high standard of "compelling state interest" in testing § 186. As noted, it met the test. (Opinion and ftn. 4, Pet. p. 6a).

The petitioners sought reargument, *in banc* reconsideration and a stay of judgment* in the Court of Appeals. All were denied April 24, 1972.

The petitioners applied to Justice MARSHALL for a stay of the Court of Appeal's judgment April 24, 1972. It was granted temporarily April 26, 1972.

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*This in spite of the fact they had dropped the demand for any type of injunctive or equitable relief below.

The Temporary Stay Should Be Vacated

The Court should not grant any stay of judgment, because the preserving of the *status quo* means allowing Election Law § 186 to operate for the 1972 primary, which is about a month away. The Court of Appeals has upheld the *status quo* in its decision. Its judgment only confirms it. In addition the petitioners cannot seek an injunction because they, four in number, truly represent only themselves. There is no Rule 23 class-action order nor did they seek one. As in *Flemming* v. *Nestor*, 363 U.S. 603, 607, 80 S.Ct. 1367 (1960), even an ultimate favorable declaration on the merits would have no effect apart from *stare decisis*. Furthermore, as previously noted, petitioners at the onset in the District Court deliberately eschewed any injunctive relief. Indeed, in an unusual maneuver, they withdrew the request for an injunction contained in their complaint in a short procedural appearance before the District Court Judge, obviously to deprive the State defendants of their right to a three-judge court, 28 U.S. §§ 2281, 2284, a procedure which we challenged before the Court of Appeals (Opin., ftn. 2, Pet. p. 4a).

A stay of judgment is simply confusing an already complicated situation and is meaningless unless intended to reactivate the reversed District Court judgment. The temporary stay has no such effect. The petitioners have no standing to claim to represent prospective enrollees subject to Election Law § 186 for reasons other than failure to enroll in a political party prior to the preceding general election. New voters who have reached 18 since the last general election can enroll for the primary until May 20, 1972, Election Law § 187, subd. 2. A stay would violate the principles enunciated in *Rockefeller* v. *Socialist Workers Party*, 400 U.S. 1201 (HARLAN, J., 1970), vacated and three-judge court aff'd. 400 U.S. 806, where the late Justice issued a stay order to preserve the *status quo* pending the State's appeal.

Reasons for Denying Certiorari

A. The Court of Appeals has followed the Supreme Court's decisions protecting the right to vote by finding § 186 promotes a compelling state interest.

The Court of Appeals opinion is unassailable in finding a "compelling state interest" in protecting party integrity and preventing "raiding". Apparently the petitioners even concede this (Pet. p. 13). Indeed the recent affirmance in *Lippitt* v. *Cipollone*, —— U.S. ——, 40 U.S.L.W. 3334 (Jan. 17, 1972), of a three-judge district court, 337 F. Supp. 1405 (N.D. Ohio, 1971) compels it. This prevention of electoral fraud and protection of the integrity of political processes also is supported by several current decisions of this Court, namely, *Dunn* v. *Blumstein*, —— U.S. ——, 40 U.S.L.W. 4269, 4274 (March 21, 1972) and *Bullock* v. *Carter*, —— U.S. ——, 40 U.S.L.W. 4211, 4215 (Feb. 24, 1972). These were cited by the Court of Appeals (Pet. App. p. 6a). Yet petitioners have not hesitated (Pet. p. 12) to claim a direct conflict. The opinion below fully complies with recent decisions and standards. It certainly found, after careful analysis of the New York political system, that § 186 was not "overbroad" as to petitioners who are newly enrolled voters (Pet. App. pp. 8a-9a).

The petitioners claim that newly enrolled voters do not pose any substantial threat of organized large scale "raiding". We respectfully disagree. According to them, literally hundreds of thousands of persons are similarly situated. It does not take much extended consideration to see that they, as easily as party-switchers, can be organized to "raid". And today there are many groups, already well organized, which can easily engage in "raiding" or short-notice takeover of an established political organization.

Indeed a political organization "Lawyers for McGovern", organized to promote the candidacy of Senator

George McGovern for the Democratic Party nomination for President, has filed a motion to file an *amicus curiae* brief in support of petitioners.* We can only assume that they see the possibility of organizing, or have already organized, thousands of non-Democrats, from within and without existing political organizations, in a "raid" on the Democratic Party. Only § 186 stops them.

Raids can emanate not only from other parties but also from groups technically outside the traditional political process. New York has a compelling state interest in protecting the integrity of its political parties in this situation also.** That is why it is not necessary to differentiate between party-switchers and newly-enrolled voters such as petitioners.

B. § 186 does not infringe on the right to travel insofar as the petitioners present a constitutional claim.

The petitioners claim that § 186 is a durational residency requirement and apply *Dunn* v. *Blumstein, supra*, — U.S. —, 40 U.S.L.W. 4289 (Mar. 21, 1972). Simply stated, § 186 cannot be such a requirement because petitioners never lacked residency. They only failed to avail themselves of the opportunity to timely enroll. Therefore as to the petitioners there is no issue on the constitutionally protected right to travel. Indeed the petitioners never raised this issue below and it was not discussed in the several opinions. Where an issue is neither raised before

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* We fail to see the interest of "Lawyers for McGovern" since their statement on page 2 of their Motion fails to state that any of their members are subject to § 186. We might note that no lawyer can be under 21 (New York Judiciary Law § 460).

** The Court of Appeals noted New York's particular interest in preventing raiding (Opin., Pet. pp. 5a-6a, ftn. 3). Due to the two minority parties, Conservative and Liberal, having limited enrollments of hardly over 100,000 statewide, absent § 186, they would be very susceptible to raids from other parties or well organized, ostensibly non-political, groups.

nor considered by the Court of Appeals, this Court will ordinarily not consider them. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 (ftn. 1), 90 S. Ct. 1598 (1970).

Furthermore, this claim of right to travel can only be presented by a possible litigant who is a newly established New York resident or who has crossed county lines within New York since the last general election and the interests of such a class would not be adequately represented by petitioners because, except for subd. 6 to Election Law § 187, (special enrollments) any one in such a class would be entitled to enrollment up to 30 days before the primary. See Election Law § 187, subd. 2, which allows special enrollments for those who lacked residency requirements for voting at the time of the last general election. Subd. 6 limits this to the same county as a person resided in at the time of the last general election. The petitioners do not attack subd. 6 simply because its elimination would not assist them. To this extent the interests of petitioners and new residents or county-movers are antgonistic. Not being either of the latter, petitioners cannot present their claim which, it might be noted, was in the *Bachrow* case, *supra*, ftn. p. 3.

C. § 186 presents no substantial constitutional issue of freedom of speech or association.

The Court of Appeals at length noted that § 186 is carefully designed to infringe minimally on First and Fourteenth Amendment rights. The less drastic means advanced by the District Court and petitioners (Election Law § 332) were rejected by the Court below because "the use of § 332 to prevent raiding would be far too cumbersome to have any deterrent effect on raiding in a primary". Requiring an inquiry into a voter's mind, its use, in face of short-notice, large scale raiding would render party officials virtually impotent. While the Constitution and Supreme Court opinions require the State to use proper means to advance a compelling state interest, it

does not require that the State choose ineffectual means (Opinion, Pet. p. 9a).

"Balancing" or "less drastic means" mentioned by petitioners and by the District Court are not appropriate. The challenge procedures and criminal sanction, cited by the District Court's opinion, pages 26a-27a, are really not "less drastic". Regular recourse to criminal sanctions and court challenge procedures will, of necessity, in this area of primary voting, have an extremely more chilling effect on the exercise of First Amendment rights than § 186.

D. § 186 is not a "Grandfather Clause" in any regard and any such claim has been rejected at all levels.

Petitioners' discussion of "grandfather clauses" is inappropriate. Section 186 does not discriminate against 18-21 year olds or racial minorities. On the contrary, it is completely neutral. It has been around much longer than the Twenty-sixth Amendment and clearly was not passed to impair the newly enfranchised's right to vote. So, too, as to racial minorities and there is no allegation that petitioners are representatives of the class. Even the favorable (to petitioners) decision in the District Court did not think these arguments worthy of mention or discussion. Petitioners have engaged in unsupported speculations, which have no basis in the record. Why persons fail to register or enroll when eligible is always a mystery and to a large measure rests on the inaction of such individual, or the instant petitioners, in any particular case. See *Fontham* v. *McKeithen*, 336 F. Supp. 153, 162 (E.D. La. 1971).

The speculative numbers game engaged in by petitioners who claim 750,000 young failed to even register to vote, much less enroll in a political party, and the claim of 500,000 by *amicus* Lawyers' more elaborate, but still faulty statistics, all are not determinative of the underlying constitutional issues. Furthermore the large number of all

voters, but especially the young, who fail either to register to vote or enroll in a party is a matter of record. See Pet. p. 25. Thus in three major counties of the City (New York, Kings and Bronx) less than 50 percent of the persons of voting age residing therein voted in the presidential elections of November 1968.* This is unfortunate but it supports the conclusion that few voters who fail to even register to vote have a sufficient interest in politics to enroll in a party. Speaking of hundreds of thousands of voters being deprived of the right to vote is absurd. The basic unreliability of the figures presented by both the petitioners and *amicus* is that they make no attempt to inform this Court or us, by research or even estimate, how many persons' enrollments are "in the box" or suspended due to Election Law § 186.

Similarly ignored or overlooked is the important question of the extent to which such factors as motivation, disinterest or inertia may be responsible not only for the non-registration of eligibles in this 18-21 age bracket, but also in other age categories. In the former connection we note an article "Teen Vote Registration Lags", New York Post, May 12, 1972, p. 1. The gist of the item is that in spite of massive efforts, registration of teenagers for the primary is lagging far behind expectations.

In short, and without laboring the point, the number of non-registered eligibles in the 18-21 age group (whatever it may actually be) plainly has no relevance to any question of the claimed unconstitutionality of § 186. This is especially true where the alleged circumstance sought to be stressed by the *amicus* group—lawyers advocating a particular candidacy—fall exclusively within the 18-21 age bracket. Once again we note that all the petitioners had an opportunity to register and enroll, but failed to do so.

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* This was the basis of the designation of those counties as subject to the Voting Rights Act of 1970, as amended 1970, and not the 1970 general election as inferred by the Pet., p. 25.

Also, as the Court of Appeals noted, ftn. 5, Pet. p. 9a, "New York does allow post-general election enrollment in certain cases. Section 187 of the Election Law allows late enrollment if, for example, the enrollee came of age after the last general election or if he was ill during the enrollment period. The import of section 187 is that New York is not opposed to later enrollment per se". Thus thousands of persons who attained 18 since the last general election can and will enroll to vote in the June 1972 primary but petitioners and *amicus* conveniently ignore this provision when playing the numbers game.

The Inappropriateness of "Summary Reversal"

The petitioners fail to discuss beyond citing Rule 35, the basis for a summary reversal. The reasons for denying certiorari make it clear, that the instant case is not "clearly controlled by one or more of [this Court's] own recent decisions". No special factors appear to warrant summary reversal. The practice is particularly unfair towards respondents Stern and Gressman, *Supreme Court Practice* (4th Ed. 1969), § 5.12 (pp. 220-222).

The petitioners by their own procedures necessarily precluded the possibility of more than one appellate review before the primary (see Memorandum of MISHLER C.J., February 17, 1972, p. 4 and Min. p. 10, Feb. 16, 1972—on Reargument). They apparently preferred the certainty of full Court of Appeals review and they succeeded.

Summary reversal has no application to the facts or law of the instant petition.

Even Assuming Certiorari Should Be Granted the Court Should Not Expedite Its Consideration

The petitioners claim they need expeditious relief. However, the voluntary dropping of the demand for injunctive relief by petitioners at the onset of litigation,

together with the conscious failure to affirmatively seek class action relief, shows that even in the event they are successful no rights will be enforceable but only a precedent for future use by others. *Cf. Flemming* v. *Nestor, supra,* 363 U.S. 603, 607, 80 S. Ct. 1367 (1960). The petitioners boldly speak for thousands they do not in any way represent. Even at this very moment, there is a case, brought in the Southern District of New York, seeking the convening of a three-judge court on a challenge to § 186. *Bass* v. *Westchester Co. Commissioners of Elections,* 72 Civ. 1644. While the result in that case would be a foregone conclusion based on the *Rosario* decision in our Circuit, apparently the plaintiff therein does not think the instant petitioners properly represent his interests and views the three-judge court as an important procedural step, one not lightly to be abandoned by a litigant.

Of course Supreme Court review on direct appeal would have been possible if the petitioners had followed the usual three-judge court procedure. As noted, *supra, Rockefeller* v. *Socialist Workers Party,* 400 U.S. 806; summary review is often appropriate to such appeals. However, the petitioners consciously rendered this impossible by going before a single judge in the District Court. The respondents herein expeditiously went on appeal to the Court of Appeals without serious objection from petitioners because all parties wanted an authoritative opinion and judgment binding throughout New York State. However, it took even the Second Circuit six weeks (February 24, 1972 to April 7, 1972) to render its opinion reversing the District Court due to the complicated issues presented. To ask the Supreme Court of the United States to review the Circuit in an even shorter period, since the primary election is June 20, 1972, seems absurd, to say the least unless the disposition is "certiorari denied."

Furthermore, the question of temporal restrictions on party enrollments has been quite recently the subject of litigation in other states. Thus *Pontikes* v. *Kusper,* ——

F. Supp. —— (N.D. Ill. Mar. 9, 1972), cited to the Court of Appeals by petitioners, struck down a two-year restriction on changes of party affiliation. There was a vigorous dissent. We are informed by counsel for the defendants-appellants that they have filed a notice of appeal in the District Court of Northern Illinois invoking the mandatory appellate jurisdiction of this Court on three-judge court judgments, 28 U.S.C. § 1253. The notice was filed April 17, 1972. We are further informed that a jurisdictional statement is being prepared and will be timely filed. Also we have learned that a similar statute in Rhode Island is going before a three-judge court. At this point a temporary restraining order has been denied. Finally there is a similar case in New Jersey.

It may very well be that this Court would want to consider all these cases together although the result in one does not necessarily control the others.* Certainly summary reversal or expedited hearing is not appropriate in considering this complicated issue, with national implications. If, after reviewing the petition for certiorari and this brief in opposition, the Court does grant certiorari, it should be done within the usual time patterns appropriate to Supreme Court practice. The event of the June 20, 1972 New York primary will not moot this case since the question will occur again. Cf. *Dunn* v. *Blumstein, supra,* ftn. 2 at 40 U.S.L.W. 4270.

We submit that in fairness to all parties the motion for summary reversal or expedited consideration on the merits be denied and the Court should vacate the temporary stay of the Court of Appeals' judgment.

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* Thus in Illinois the price exacted for a change of party allegiance is not voting in a primary for at least two years. New York and § 186 impose no such penalty. If the voter changes his enrollment before the preceding general election he votes in the primary of his choice the following year.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, May 22, 1972.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Judgment of District Court (Reversed).

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

No. 71-C-1573

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,

Plaintiffs,

against

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Defendants.

No. 71-C-1621

STEVEN EISNER, on his behalf and on behalf of all others similarly situated,

Plaintiffs,

against

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County.

Defendants.

These actions having been consolidated by the court and the court having by memorandum of decision dated this day

determined that § 186 of the Election Law of the State of New York contravenes the First and Fourteenth Amendments to the Constitution and is violative of the Voting Rights Act of 1965 as amended, insofar as it pertains to the June 1972 primary to be held in the State of New York, it is

ORDERED, ADJUDGED and DECREED that plaintiffs have judgment against the defendants declaring § 186 of the Election Law of the State of New York unconstitutional and violative of the Voting Rights Act of 1965 as amended.

Dated at Brooklyn, New York, this 10th day of February, 1972.

LEWIS ORGEL,
Clerk of the Court.

Approved and Ordered that it be entered

JACOB MISHLER,
U.S.D.J.